Supreme Court, U.S.
FILED

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No. _____

IN THE SUPREME COURT

OF THE UNITED STATES

October Term, 1998

KIM LLOYD DELAP,

Petitioner,

v.

STATE OF OREGON

On Petition For Writ Of Certiorari
To The Supreme Court of the State Of Oregon

PETITION FOR WRIT OF CERTIORARI

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26 pp

Question Presented

Petitioner, a criminal defendant below, stood trial before a duly-impaneled jury. Both parties agree that jeopardy attached. The jury never approached the court to report that they were having difficulty reaching a verdict. After about six hours of deliberation some members of the panel reported to the clerk that they were at an "impasse," but the jury was never brought into open court to describe the state of their deliberations. Neither party asked for a mistrial. Defense counsel said he wanted the jury to keep deliberating. After another half-hour of deliberation, the trial judge went back into the jury room, had a discussion with the jurors on the record, and then released them from the jury room. He declared a mistrial on his own motion.

Were the trial court's actions sufficient to nullify jeopardy and to permit a new trial on the same cause?

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KIM LLOYD DELAP,

Petitioner,

v.

STATE OF OREGON

Petition For Writ Of Certiorari The Supreme Court of the State Of Oregon

Petitioner, a criminal defendant, respectfully prays that the Court issue a writ of certiorari to review the judgment of the Oregon Supreme Court in this case.

Opinion Below

The Oregon Supreme Court denied the petitioner's Petition for an Alternative Writ of Mandamus, without an opinion, on June 16, 1998. The ruling is set forth in the appendix, at A-3.

Basis for Jurisdiction

The Oregon Supreme Court is the highest court of a State in which a decision could be had in this case. Petitioner claims a right to be free of a second

prosecution under the United States Constitution, Double Jeopardy Clause. Jurisdiction of this court is based on 28 U.S.C. § 1257(a).

The appellate decision was issued by the Oregon Supreme Court on June 16, 1998. The effective date of the appellate judgment was June 16, 1998. This petition is filed within 90 days.

Constitutional Provision Involved

The Fifth Amendment to the United States Constitution provides in relevant part:

> ". . . nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb . . . . ."

Statement of the Case

The defendant was charged with Assault in the Second Degree under Oregon law, Or. Rev. Stat.

§ 163.175(1).[1] The indictment charged, in sum, that on September 22, 1997, he intentionally caused physical injury to Nancy Yates by means of a dangerous weapon.

He stood trial before a duly-impaneled jury. After about six and one half hours of deliberation, the judge went into the jury room to check on the state of their deliberations. Some of the jurors reported they were at an "impasse." The jury was never brought into open court to report the state of their deliberations. The petitioner asked that the jury

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[1] Or. Rev. Stat. § 163.175. Assault in the second degree:

(1) A person commits the crime of assault in the second degree if the person:

(a) Intentionally or knowingly causes serious physical injury to another; or

(b) Intentionally or knowingly causes physical injury to another by means of a deadly or dangerous weapon; or

(c) Recklessly causes serious physical injury to another by means of a deadly or dangerous weapon under circumstances manifesting extreme indifference to the value of human life.

(2) Assault in the second degree is a Class B felony.

continue to deliberate. However, the court declared a mistrial on its own motion.

The State of Oregon seeks a retrial.

There is no interlocutory appeal in Oregon for double jeopardy cases. State v. Salzmann, 119 Or. App. 217, 850 P.2d 1122, *rev denied,* 317 Or 162, 856 P.2d 317, (1993), *cert denied,* 510 U.S.1040 (1994). Petitioner filed a petition for an alternative writ of mandamus in the Oregon Supreme Court under Or. Rev. Stat. § 34.250.[2] The Oregon Supreme Court has

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[2] Or. Rev. Stat. § 34.250 provides:

(1) The provisions of this section apply only to the exercise of the Supreme Court's original jurisdiction in mandamus proceedings that challenge the actions of judges in particular cases in the circuit courts, the Oregon Tax Court or the Court of Appeals. The provisions of this section do not apply to the exercise of the Supreme Court's original jurisdiction in mandamus proceedings that challenge the administrative action of a judge or court, or that challenge other action of a judge or court that is of an institutional nature. To the extent that any provision of ORS 34.105 to 34.240 is inconsistent with the provisions of this section, the provisions of this section govern in mandamus proceedings subject to this section.

(2) [Regarding the case title]

(continued...)

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[2](...continued)

(3) [Regarding service]

(4) The judge or court whose action is challenged in the mandamus proceeding may seek to intervene in the mandamus proceeding if the judge or court wishes to assert an interest separate from the parties. If the Supreme Court allows the judge or court to intervene, the judge or court shall be designated as "intervenor" in the mandamus proceeding.

(5) If the Supreme Court elects to issue an alternative writ of mandamus, the Supreme Court shall issue an order allowing the petition. The order may be issued in combination with the alternative writ of mandamus. The State Court Administrator shall mail copies of the Supreme Court's order and alternative writ of mandamus to the relator, to the adverse party, to any intervenor, and to the judge or court whose action is challenged in the petition. Proof of service of an alternative writ need not be filed with the Supreme Court, and the judge or court to which the writ is issued need not file a return unless the alternative writ specifically requires a return.

(6) At any time after the filing of the petition for writ of mandamus or issuance of the alternative writ of mandamus, if the judge or court whose action is being challenged performs the act sought in the petition or required by the alternative writ, the relator shall notify the Supreme Court that the judge or court has complied. The judge, the court, or any other party to the lower court case may also give notice to the Supreme Court of the compliance. On motion of any party or on its own motion, the Supreme Court may dismiss a mandamus proceeding after receiving the notice provided for in this subsection.

(continued...)

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[2](...continued)

(7) If the judge or court to whom the alternative writ of mandamus is directed does not perform the act required by the writ, the mandamus proceeding will proceed to briefing and oral argument as provided in the rules of the Supreme Court or as directed by the Supreme Court. An answer or other responsive pleading need not be filed by any party to the proceeding unless the alternative writ specifically requires the filing of an answer or other responsive pleading.

(8) If the Supreme Court has determined that the relator is entitled to a peremptory writ of mandamus, the court shall direct the State Court Administrator to issue a peremptory writ of mandamus. The peremptory writ of mandamus may be combined with the appellate judgment. If a combined peremptory writ of mandamus and an appellate judgment issue, the relator need not file proof of service of the writ with the court, and the judge or court to which the writ is issued need not file a return showing compliance with the writ.

(9) The State Court Administrator shall issue an appellate judgment showing the Supreme Court's disposition of the matter, as provided in the rules of the Supreme Court, if:

(a) The court has issued an alternative or peremptory writ of mandamus, the mandamus proceeding is concluded and all issues in the proceeding have been decided; or

(b) The court has not issued a writ of mandamus, but the court has awarded costs and disbursements or attorney fees in the proceeding.

discretion as to whether or not to hear such petitions, and it declined to hear it on June 16, 1998. Or. Const. Art. VII (Amended) § 2.[3]

Statement of the Facts

The jury trial began on February 24, 1998, in this criminal case. A jury was impanelled, evidence was presented by both sides, and counsel for both parties argued. On Monday morning, March 2, the jury was instructed and retired to deliberate before 10:00 a.m. Sometime after noon both counsel were instructed to return to the judge's chambers at 3:30 p.m., to talk about what should happen if the jury could not reach a verdict.

Some time before 3:30 the court went into the jury room with a court reporter to inquire how they were progressing. The transcript reports the "Jurors" said "Not well." Juror Graham said, "Not making

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[3] Art. VII (Amended) § 2 provides: The courts, jurisdiction, and judicial system of Oregon, except so far as expressly changed by this amendment, shall remain as at present constituted until otherwise provided by law. But the supreme court may, in its own discretion, take original jurisdiction in mandamus, quo warranto and habeas corpus proceedings.

much progress. We've swapped two votes on one side or the other, but we're---- [cut off]." Juror Suzumoto asked to be reinstructed on an element and Juror Stutevoss said that would be helpful.

When the lawyers arrived at 3:30 the judge reported that the jury said that they were having difficulty reaching a verdict. He reported they were six and six. The jury did not say they could not reach a verdict.

The court asked what the lawyers preferred to do. Petitioner's lawyer said that he wanted the jury to stay out until they reached a verdict, even if it took a week. The judge said it was not reasonable to leave them out that long. The court said it would give the requested re-instruction and then let the jury deliberate for another 15 minutes. If the jury did not reach a verdict he would let them go at that point.

The jury asked to be re-instructed on the elements of "physical injury," and the court read that instruction in the jury room. The court, still in the jury room, then said it would:

> * * * give you about another 15 minutes or so and then check with you, see how you feel. You know, there's lots of things we could do. We could adjourn for the day, come back tomorrow, or you can say you want some more time, or we could-- those are really about the only alternatives or you could say you've reached an impasse, you will have reached an impasse, but you're the only ones that know that.
>
> So we'll give you about 15 minutes. I'll check back with you.

About 15 minutes later the court instructed the clerk to go into the jury room. The clerk did so, and said on the record,

> The clerk: They used the word, "impasse." I said where are you? One woman said impasse, and the rest of them nodded in consensus. They all nodded. They said more time today or more time--one said more time next week won't make a difference.

Then the court asked the lawyers:

The court: Are you guys--do you want to -- you want to try to do anything *[e.g., negotiate]* or just want another trial date?

The state: [To defense counsel] I think you've got to come up [in the defense's plea offer], I've got to come down [on the state's plea offer]. You want to talk to your guy?

Defense counsel: No, we tried this case --

The court: Well, I've got to go.

Defense counsel: What are you [the state] thinking?

The state: You know, I don't know.

Defense counsel: Are you [the court] going to go ahead and tell them [the jury] to take off?

The court: Yeah, yeah. If you guys work something out, come back tomorrow morning at 8:30 and we'll do it.

Defense counsel: How about if we can have maybe a day or so?

> The court: All right. Let's make it Wednesday, see if you can work it out.

The court then went into the jury room and said to the jurors, "As I understand from [the clerk] more time would not produce a verdict. Is that pretty accurate?" Juror Graham said, "That's how we understand it," and an unnamed juror said, "Regretfully." The court thanked them and released them.

The jury never approached the judge with a report of their state of deliberation, they only responded when they were asked to report. The defendant never requested a mistrial. The record shows that the jury was questioned in the jury room by the trial court and by court staff, but it was never questioned in open court in front of the lawyers. The court made no findings on March 2.

Trial was re-set and the defendant filed a motion to dismiss based on statutory and constitutional double jeopardy. There was a hearing on the motion on April 14, 1998. The state moved for a mistrial. The court denied the state's motion as being too late, and ruled that the mistrial would be declared on its

own motion. The state also asked for findings. Defense counsel argued the court could not now make findings because the record would not support them because the jury had been discharged. He argued the jury should have been polled in open court about their state of deliberations. Nevertheless the court ruled:

> "* * * the court just kind of feels I made findings on the record, talked to them, and they told me they were at impasse, wouldn't be any change in the future, that was the finding that I made, and that this is the record. And that that's exactly what I found is what they told me."

The written Court Order (entered April 21, 1998) provides:

> "On March 2, 1998 it satisfactorily appeared to the Court that there was no probability of an agreement between the jurors and a termination other than by judgement of acquittal, was necessary because the jury was unable to agree upon a verdict. Therefore on the court's motion the Court declared a mistrial." "The Defendant's [Petitioner's] motion to

dismiss because of former jeopardy is denied."

The court has granted a stay of the trial date to allow appellate review.

The prosecution seeks to re-try the case.

Where the Federal Question Was Raised Below

In Petitioner's Motion to Dismiss (page 3) filed after trial, he argued that he had a right to be free of a second prosecution under the applicable Oregon statutes, and under the Oregon and United States Constitutions, specifically citing U. S. Const. Am V, XIV. On page 6 of the Motion he discussed the "manifest necessity" factor under Arizona v. Washington, 434 U.S. 497 (1978) and the analysis of Richardson v. United States, 468 U.S. 317 (1984). He then cited Abney v. United States, 431 U.S. 651, 661-62 (1977) to argue that he had a right to be free not just of an improper conviction, but also of a second trial.

These identical points were made in his Memorandum in Support of Petition for Alternative Writ of Mandamus, (pages 8 and 14) to the Oregon Supreme Court.

Reasons for Granting the Petition

The constitutional double jeopardy protection guarantees that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb." U. S. Const., Amend. V; Abney v. United States, 431 U.S. 651 (1977). In this case the parties agree that jeopardy attached.

The question is, can jeopardy be nullified because there was "manifest necessity" for terminating the trial prior to a verdict. That phrase characterizes the magnitude of the prosecutor's burden. The court may order a mistrial only when the jury is "genuinely deadlocked." Richardson v. United States, 468 U.S. 317, 324 (1984), *citing* Arizona v. Washington, *supra*, 434 at 509. In this case, the jury was not genuinely deadlocked.

The jury was obviously having difficulty, but they had been deliberating only six and a half hours when they were released. This Court has never articulated a bright line delineating how long a jury must deliberate, and the matter is not subject to a bright-line analysis. However, six and one half hours, on a weekday, from mid-morning to mid-afternoon, is

brief indeed. This Court has approved a retrial, after a hung jury, when the jury deliberated for 40 hours (Logan v. United States, 141 U.S. 263, 297-98 (1892)) and when the jury was deliberating all night, from 4:00 in the afternoon until 9:30 the next morning (Dreyer v. Illinois, 187 U.S. 71, 85 (1902).) In both cases the jurors declared they were deadlocked in open court.

By contrast, in this case the court began articulating the concept of a mistrial around noon, and by 3:30 declared one and then said, "I've got to go." The jurors were never examined in open court, nor were they examined in the presence of counsel, to evaluate whether or not they were deadlocked. Defense counsel objected to the mistrial. The jury being at an "impasse" does not mean they cannot reach a verdict or are genuinely deadlocked. This Court requires a "high degree" of necessity before a mistrial can be granted. Arizona v. Washington, *supra*, 434 at 506. This standard was not met in this case, as a matter of law.

The Double Jeopardy Clause gives a criminal defendant a "valued right to have his trial completed

by a particular tribunal. [Citation omitted.]" Oregon v. Kennedy, *supra*, 456 U.S. 671-72.

These double jeopardy protections are not simply protections against a conviction after a second trial: they are protections against having to submit to a second trial. Abney v. United States, *supra*, 431 US 661-62.

> "'[T]he State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.' [Citations omitted]
>
> "Obviously, these aspects of the [double jeopardy] guarantee's protections would be lost if the accused were forced to 'run the gauntlet' a second time before an appeal could be taken; even if the accused is acquitted, or, if convicted, has his conviction ultimately reversed on double jeopardy grounds, he as still been forced to endure a trial that the Double

Jeopardy Clause was designed to prohibit."

Because Oregon does not have a statute authorizing interlocutory appeals, the Oregon Supreme Court's denial of the request for an alternative writ of mandamus forces this defendant to stand trial a second time in violation of his right to be free of double jeopardy. The Oregon Supreme Court must address this claim to vindicate his federal rights.

Conclusion

For these reasons, the Court should issue a writ of certiorari to review the judgment and decision of the Oregon Supreme Court in this case.

Respectfully submitted,

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September ___, 1998

IN THE CIRCUIT COURT OF THE STATE OF OREGON FOR MULTNOMAH COUNTY

THE STATE OF OREGON,	)	NO. C97-09-37429
Plaintiff,	)	
v.	)	COURT
	)	ORDER
KIM LLOYD DELAP	)	
Defendant.	)	

This matter came before the court today on Defendant's motion to dismiss on the grounds that the defendant was placed in jeopardy when he was tried to a duly-impanelled jury, and he cannot be placed in jeopardy again. Deputy District Attorney Rod Underhill appeared on behalf of the state and the Defendant appeared in person and represented by Anthony Furniss and Laura Graser. After hearing the statements of the parties and being fully advised of the premises the Court makes the following findings:

On March 2, 1998 it satisfactorily appeared to the Court that there was no probability of an agreement between the jurors and a termination other

than by judgement (sic) of acquittal, was necessary because the jury was unable to agree upon a verdict. therefore on the court's motion the Court declared a mistrial. The case has been set for retrial on the indicted charge of ASSAULT IN THE SECOND DEGREE.

The defendant's motion to dismiss because of former jeopardy is denied.

The court finds that the Defendant has given notice to the Court of intent to file mandamus.

[The] Court grants Defendant's request for a stay of the current trial date of May 4, 1998.

Stenographic notes of this proceeding were made by the court reporter, Sonja Lockhart.

Dated April ___, 1998

[entered April 21, 1998]

/s/Harl Haas
Harl Haas, Judge

IN THE SUPREME COURT
OF THE STATE OF OREGON

STATE OF OREGON, Plaintiff-Adverse Party,	)	Relating to Multnomah County Circuit Court No. C97-09-37429
v.	)	
	)	SC S45295
KIM LLOYD DELAP, Defendant-Relator.	)	ORDER DENYING PETITION FOR ALTERNATIVE WRIT OF MANDAMUS

Upon consideration by the court.

Relator's petition for alternative writ of mandamus is denied.

DATED this 16th day of June, 1998.

/s/ WALLACE P. CARSON, JR.
WALLACE P. CARSON, JR.
CHIEF JUSTICE

C: Laura Graser
Kaye E. Sunderland

DESIGNATION OF PREVAILING PARTY
AND AWARD OF COSTS

Prevailing party: Plaintiff
[X] No costs awarded. [ ] Costs awarded payable by: